No. 2733

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY C. CUTTING,

Appellant,

vs.

HENRY J. WOODWARD, FRANCIS A. WOODWARD and THE MONETARY TRUST COMPANY (a corporation),

Appellees.

APPELLANT'S SUPPLEMENTAL AUTHORITIES in Opposition to Appellees' Motion to Dismiss.

JACOB M. BLAKE,
Solicitor for Appellant.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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A further authority in support of the finality of that portion of the decree appealed from, declaring the title to 1175 shares of stock of the Land Company to be in the appellee Trust Company is the case of the *Detroit & M. R. Co. v. Michigan Railroad Commission,* decided by the United States Supreme Court April 3, 1916, and reported in the United States Supreme Court Advance Opinions, 1915, May 1, 1916, No. 11, p. 427, and which went up on writ of error to Supreme Court of Michigan to review a judgment awarding a writ of mandamus to enforce obedience by a railroad company to an

order of the Railroad Commission, directing it to relay rails removed by it from a logging spar, and to resume service thereon.

The facts show that following the making of this order by the Railroad Commission, the railroad company filed a bill in equity in the state circuit court of Wayne County praying that the order be vacated and its enforcement be temporarily and permanently enjoined. During the pendency of the suit in the state court the mandamus suit was commenced and carried to judgment in the Supreme Court by the Railroad Commission. The answer of the railroad company denied that it had had an adequate opportunity to be heard, and that to require it to give effect to the Commission's order in advance of a hearing and decision upon that question in the suit in equity would deprive it of due process of law.

Upon the motion to dismiss the Court says:

> "Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of Sec. 237, Judicial Code (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, Sec. 1214), upon which our power to review depends, because the judgment does not determine the merits and end the litigation. But, as this Court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute. Weston v. Charleston, 2 Pet. 449, 463-465; 7 L. ed. 481, 486, 487; Cent. Transp. Co. v. Pullman's Car Co, 139 U. S. 24, 40; 35 L. ed 55, 61; 11 Sup. Ct. Rep. 478; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabam Interstate Power Company, 240

> U. S. 30, ante 234, 36 Sup. Ct. Rep. 234. This view has prevailed through a century of practice in reviewing judgments and decrees for want of jurisdiction or for other reasons not decisive of the merits."

We desire to call especial attention to the use by the Court of the words "particular cause" as applying to the particular cause of suit involved on this appeal, the decree as to which we claim to be final. At page 17 of our main answer brief to the motion to dismiss, we earnestly request the Court to determine if there be any case where a Federal Court has refused to entertain an appeal in advance of a full determination of all the issues, except where the cause was reserved to a master judicially to pass upon some undetermined matter relating to *the single issue from the decision of which it was sought to prosecute the appeal.* We neglected then to point out that both the cases of *McGourky v. Toledo and Ohio Central Railway Company,* 146 U. S. 546, and *California National Bank v. Stateler,* 171 U. S. 449, relied upon by the appellees, and where it was held that the decrees were not final, involved but a single issue in each case, and the decrees, adjudging the title to the property in the one case and to the fund in the other, involved a reference and further hearing of the cause upon *those issues for the purpose of determining judicially the further rights of the respective parties in relation thereto.*

In *Craighead v. Wilson,* 18 How. 201, relied upon by the appellees, the Court says:

> "In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the master. It is his duty, under the interlocutory decree, to balance the equities, by ascertaining what has been expended on the property, and what has been received by each of the claimants; and also every other matter which should have a bearing and influence in the distribution of the property. Until the court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final."

But such is not the case with reference to that part of the decree appealed from here and which determines the title *absolutely* to the 1175 shares of stock as well as to "the income, profits, dividends, or benefits" derived therefrom.

We respectfully submit that in view of the added authorities here submitted and the absence of any authority refusing to recognize as final a decree finally adjudging the full rights of all of the parties to property which is the subject matter of a separate and distinct cause of suit, such a decree is one which determines "the particular cause," and is, therefore, final and appealable.

Dated, San Francisco,
May 10, 1916.

Respectfully submitted,

JACOB M. BLAKE,
Solicitor for Appellant.